

Decision No: [2012] NZREADT 12

Reference No: READT 025/11

IN THE MATTER OF an appeal made under s 111 of the Real Estate Agents Act 2008

BETWEEN **JAMES CONQUER**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC10011)**

First Respondent

AND **JOHN ROUTEN**

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport – Chairperson
Ms J Gaukrodger – Member
Mr G Denley – Member

HEARD at AUCKLAND on 23 January 2012

APPEARANCES

Mr T Rae – Counsel for the REAA
Mr L Clancy – for first respondent
No appearance by second respondent

Introduction

[1] Mr Conquer appeals against the decision of the Complaints Assessment Committee dated 19 November 2010 which found him guilty of unsatisfactory conduct, and the penalty decision issued in February 2011. The Tribunal issued an oral decision at the end of the hearing on 23 January 2012. That oral decision is annexed to this decision and marked with a letter “A”. This decision sets out the reasons on which the Tribunal reached its conclusion to uphold the appeal by Mr Conquer and to reverse the decision of the CAC and its finding of unsatisfactory conduct.

[2] Mr Routen did not appear at the hearing but evidence was given by Mr Conquer and his daughter Laura.

The issues on appeal

[3] The parties have identified the following issues on appeal:

- (i) Whether the CAC made a mistake of fact in its decision dated 19 November 2010 by finding that Mr Conquer failed to keep Mr Routen well informed about how the auction would operate, what Mr Routen could expect during the auction process and the role that Mr Conquer would be playing during the auction.
- (ii) Mr Conquer also appealed against the penalty decision of 9 February 2011 which imposed the penalty that Mr Conquer must apologise for incorrect material submitted to the Committee about the complainant's wife.

[4] The appeal under s 111 is by way of rehearing therefore while the parties had helpfully identified the issues set out above the Tribunal were mindful of the fact that they would need to understand the entire factual matrix and determine what it felt were the issues. Evidence was received from Mr Conquer and his daughter. He was cross examined about the meeting that took place between Mr Conquer and Mr and Mrs Routen of the day of the auction in March 2010.

The Case

[5] Mr and Mrs Routen had engaged Mr Conquer to act as their agent in the sale of their property at 44 Matarangi Road, Manukau. It was to be sold by auction. Their property was listed with Barfoot and Thompson's Dannemora branch in February 2011 and was to go to auction on 2 March 2010. Mr Conquer gave evidence that prior to the listing and during the marketing programme there were numerous meetings, telephone calls and e-mails with the Routens. He said that he felt that they had a good working relationship. The appraisal of the property carried out by Barfoot and Thompson at the time of the listing was that the property was worth approximately \$525,000. The property however was a monolithic clad property and Mr Conquer was at pains to advise the Tribunal and the Complaints Assessment Committee that he also had concerns about the public perception of purchasing a monolithic property, notwithstanding the fact that two building reports had failed to find any evidence of any leaks in the property. Mr Conquer says that he and his daughter gave feedback to the Routens about this fact and the fact that during the open homes they were receiving feedback that the market value was lower than \$525,000.

[6] On the morning of the auction Mr Conquer called in to see Mr and Mrs Routen unannounced. This meeting seems to have led to the beginning of the Routen's dissatisfaction with Mr Conquer and the Barfoot and Thompson auctioneers. At this meeting Mr Conquer said that he wanted to let Mr Routen know that there had been further adverse publicity about monolithic clad homes in the New Zealand Herald over the previous weekend (the auction was a Tuesday). He said that the Routens should consider accepting any reasonable offer that was put to him. Mr Conquer told the Tribunal that he could not remember any feeling of disquiet or that the meeting had not gone well when he left the Routens but he acknowledged that by the time they arrived at the auction, (2.00 pm) their body language indicated that they were unhappy with him. In their letter of complaint they say that the auction process was not a fair process and that they felt bullied, and that scare tactics were used by Mr Conquer and Barfoot and Thompson's auctioneers to make them accept the eventual sale price of \$505,000. They say that they are not unhappy (*per se*) with the price reached but simply the method used by Barfoot and Thompson and Mr Conquer to achieve this sale. They say

that they felt that Mr Conquer was not acting for them in this process and that they felt unsupported and pressured during the auction process.

[7] We have not heard Mr Routen's evidence about this and the cross appeal that he lodged against the Complaints Assessment Committee's decision was withdrawn in an e-mail in May 2010. In that e-mail he said that he had lost faith in the process and did not wish to participate any more but instead would be taking his grievances up through the Disputes Tribunal and other avenues.

Conclusion

[8] In the end having heard the evidence and read the voluminous written material put before us we consider that it appears to have been Mr Conquer's unheralded discussion on the morning of 2 March which led to the Routens feeling that they were being "*softened up*" to accept a lower price. With the benefit of hindsight we considered that this visit by Mr Conquer was unwise. We have considered the evidence relating to the auction process. Many of the complaints seem to relate to the actions of the auctioneer and the auctioneer's assistant on the day. They also complain that Mr Conquer did not support them on the day in question. Because we have not heard from the Routens we cannot determine whether there are any other matters of concern. We have considered the oral and written evidence. We do not find that the facts we heard support the conclusion that Mr Conquer did not advise the Routens of the way the auction process worked. Mr Conquer seems to have taken all the necessary care to advise the vendors of how the process worked. We consider facts that the evidence shows that Mr Conquers actions do not reach a sufficient level of seriousness in our opinion to warrant a disciplinary finding of professional misconduct, even at the lower end of the scale such as unsatisfactory conduct. We acknowledge how stressful selling a home can be and that the auction process itself puts vendors in the position of having to make a decision about whether or not they will accept an offer which is often lower than that which they had hoped to achieve. However Mr Conquer's conduct does not reach the required level of misconduct to warrant a disciplinary finding.

[9] For those reasons the Tribunal accordingly reverses the decision of the Complaints Assessment Committee and sets aside the finding of unsatisfactory conduct. The penalty order will therefore fall away. We do note however that as an aside, that it is unlikely that a penalty order unrelated to the subject matter of the complaint would have stood further scrutiny.

[10] Pursuant to s 113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s 116 of the Act.

DATED at AUCKLAND this 2 day of April 2012

Ms K Davenport

Ms K Davenport
Chairperson



Mr J Gaukrodger

Mr J Gaukrodger
Member

Mr G Denley

Mr G Denley
Member

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Decision No: [2012] NZREADT 8

Reference No: READT 025/11

IN THE MATTER OF

an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

JAMES BRIAN CONQUER

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 10011)**

First Respondent

AND

JOHN ROUTEN

Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport – Chairperson
Mr J Gaukrodger – Member
Mr G Denley – Member

APPEARANCES

Mr T Rea – on behalf of the appellant
Mr L Clancy – for first respondent

DECISION

[11] Mr Conquer appeals the decision of the Complaints Assessment Committee 10011 dated 19 November 2010 in an appeal to a decision dated 9 February 2011. The Tribunal's powers on appeal are contained in s 111 of the Real Estate Agents Act 2008. The Tribunal can confirm, reverse or modify the determination of the Complaints Assessment Committee.

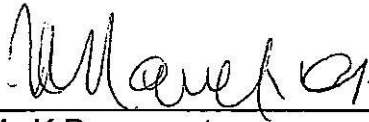
[12] The Tribunal found at paragraph 4.9 of its decision that after taking into account the facts that they set out that despite the good intentions the licensee fell short of his obligation to keep the complainant well informed about how the auction would operate, what he could expect to happen during the auction process and the role that the licensee would be playing for the complainant throughout this critical time. A consequence of this breakdown in communication was that the complainant and his wife felt isolated and intimidated during the auction and their perceived lack of support from the licensee at this time compounded the problem. The Complaints Assessment

Committee found that the complainant and his wife could not understand what was happening at the crucial times and this is what led to the complaint now before it.

[13] The Tribunal has heard today from Mr Conquer and Ms Conquer, Mr Routen did not attend. For reasons which will be set out in our written decision we reverse the decision of the Complaints Assessment Committee. We consider that some of the conduct of Mr Conquer might on subsequent reflection have been unwise but it did not amount in a disciplinary sense to unsatisfactory conduct and we uphold the appeal.

[14] Pursuant to s 113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s 116 of the Act.

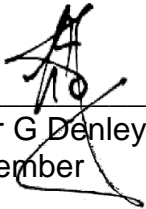
DATED at AUCKLAND this 29 day of March 2012



Ms K Davenport
Chairperson



Mr J Gaukrodger
Member



Mr G Denley
Member